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In the Supreme Court of the United States

OCTOBER TERM, 1941.

No.....

FIXLER BROS., INC.,
a Corporation,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit.

Fixler Bros., Inc., a corporation of the State of Illinois, petitions this Court to issue its writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Sixth Circuit, entered on March 6th, 1941 in Cause No. 8591 in said Court, wherein this petitioner was Appellee and the respondent, Appellant.

SUMMARY STATEMENT OF MATTER INVOLVED.

This action was originally brought by Fixler Bros., Inc. in the State Court of Ohio under the Ohio Statute against The Automobile Insurance Company of Hartford, Connecticut, insurer of The Gregg Carloading & Distributing Company, an interstate trucking company, then in bankruptcy in Ohio, to recover the amount of a judgment previously obtained against the Gregg Company in the Municipal Court of Chicago covering the loss of merchandise suffered when a partially loaded truck containing the

goods of Fixler Bros., Inc. was stolen from an attended parking lot in New York City, N. Y. on May 10, 1937, where it was parked over night awaiting completion of its load at the Gregg dock before beginning its transportation from New York to Chicago.

The cause, on petition of the Insurance Company, was removed from the State Court to the District Court of the United States for the Northern District of Ohio, Eastern Division. A jury being waived, the case was tried to the Court and judgment was rendered in favor of Fixler Bros., Inc. in the sum of $3337.40. The Insurance Company filed its appeal in the Circuit Court of Appeals for the Sixth Circuit, and that Court reversed the District Court and entered judgment for Fixler Bros., Inc. in the sum of $239.39, the amount admitted by the Insurance Company to be due by reason of an endorsement attached to the policy.

BASIS OF THIS COURT'S JURISDICTION.

The statutory provision believed to sustain the jurisdiction of this Court to review the judgment of the Circuit Court of Appeals is Section 240 (a) of the Judicial Code (U. S. Code, Title 28, Sec. 347 (a)).

The judgment of the Circuit Court of Appeals was entered on March 6th, 1941.

QUESTIONS PRESENTED.

1. Did not the Circuit Court of Appeals fail to apply the law of Ohio and to follow its own ruling and those of this Court,—that an insurance policy containing language susceptible of two or more interpretations is to be construed strictly against the Company which prepared it and favorably to the party which had no voice in its preparation?

2. Did not the Circuit Court of Appeals in construing the language of the policy to require that only agents of the insured could attend the truck,—thereby eliminating at-

tendants in parking lots,—place such a construction on the language "not be left unattended" as unwarrantedly favored the insurer which had it within its power to define unmistakably the degree of care and kind of attendants required?

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

(1) The decision of the Circuit Court of Appeals, in holding that language of an insurance policy, so obviously susceptible of two interpretations, contains no ambiguity, and then in construing that language most favorably to the insurer, is in direct conflict not only with the long established law of Ohio in the case of *State of Ohio vs. Executors of Thomas Worthington,* 7 Ohio, Part 1, page 171, but also with the law as declared by the Sixth Circuit Court itself in the case of *Fidelity & Deposit Company of Maryland vs. Friedlander,* 101 Fed. 2d, 106.

(2) If the decision be permitted to stand, it will have a severely deterrent effect upon shippers contemplating the use of interstate trucks,—a method of transportation only recently taken under the supervision of the Interstate Commerce Commission, and presumably to be developed and encouraged, especially at this critical time, when circumstances call for the fullest possible use of all available means of transportation of merchandise.

JOSEPH MCCORMACK,
GEORGE B. FOLK,
Counsel for Petitioner.

In the Supreme Court of the United States

OCTOBER TERM, 1941.

No. .....

FIXLER BROS., INC.,
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vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

OPINIONS OF THE COURTS BELOW.

The opinion of the Circuit Court of Appeals is reported at 117 Fed. (2d) 979. It is also included in the printed record filed herewith. (Record page 29.)

The opinion of the District Judge designated "Findings by the Court and Judgment" is included in the printed record filed herewith. (Record page 19.)

No other opinions were rendered by either Court.

GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

These grounds have been set forth in the petition (*supra*, p. 2) and in the interest of brevity are not repeated here.

STATEMENT OF THE CASE.

The facts have been summarized in the petition. (*supra*, p. 1.) Inasmuch as the questions here presented concern more particularly whether or not the truck was left "unattended" within the meaning of paragraph 9 of the

policy, we relate facts pertaining to that subject somewhat more in detail.

Fixler Bros., Inc., an Illinois corporation, doing business in Chicago, ordered from a New York supply house six cases of linen piece goods to be shipped by motor truck operated by The Gregg Carloading & Distributing Company, an Ohio corporation with its principal office in Cleveland, Ohio, a common carrier engaged in interstate commerce.

The merchandise mentioned was loaded late in the afternoon of May 10th, 1937, from the Gregg Company dock onto one of the Gregg trucks operated by Walter C. Hanson and the truck locked and sealed. The truck was then driven away from the loading dock, the driver being instructed to return the next morning and complete the load, which was to be transported from New York to Chicago. In accordance with his usual custom, Hanson drove the sealed truck to an attended parking lot, which was surrounded on two sides by high buildings and on the other two sides by a high fence in which, on the 26th Street side, were two gates. After parking the truck he paid one of the two attendants the regular charge, turned over his keys and received a parking ticket. He then went to a hotel, spent the night there, returning to the parking lot around 7:45 o'clock the following morning. Two attendants were there, but the one to whom he had given his keys was not. The truck was missing from the parking lot and was not located until the next afternoon, when police officers found it on 50th Street. The cargo had been removed and the truck was empty.

The insurance company admitted the issuance of the policy and conceded that both Fixler Bros., Inc. and the Gregg Company had complied with the requirements of the policy insofar as notice and filing proof of loss were concerned.

Having received no reimbursement for its loss, Fixler Bros., Inc. on September 14th, 1937, commenced an action

in the Municipal Court of Chicago against the Gregg Company, serving the latter with summons at its office in Chicago. In due course, on September 28th, 1937, a general appearance was entered for the defendant, the Gregg Company, by its attorneys, Messrs. KixMiller, Barr & Morris. Notice of the action was given to the insurance company but it elected not to defend its assured, as its policy gave it the right to do. On October 19th, 1937, judgment was entered in the presence of the attorneys for the carrier in the amount of $3114.58.

On January 22nd, 1938, after the expiration of the statutory time required by the law of Ohio, the insured carrier then having been adjudged a bankrupt in Cleveland and recovery from that source being impossible, Fixler Bros., Inc., entered suit in the Court of Common Pleas of Cuyahoga County, Ohio, against the insurance company on the judgment obtained in Chicago. The suit was removed by the defendant insurance company into the United States District Court. A jury being waived the case was tried to the court.

The insurance company rested its defense solely on allegations that the Gregg Company had failed to comply with the provisions of paragraphs 8 and 9 of the policy. Paragraph 8, which covered the requirements when the cargo was "in transportation between point of shipment and destination" is not involved here because, as the District Court found, the cargo was not "in transportation within the provisions of Section 8, since the truck was only partially loaded and was not enroute between point of shipment and its destination." (Record, page 8.) The Circuit Court of Appeals did not dispute that finding.

With respect to Paragraph 9 the insurance company claimed more specifically that the truck and cargo had been left unattended so as to require it to be garaged in a substantial building. The District Court having before it the stipulation and the uncontradicted testimony of Walter C.

Hanson, that the parking lot was an attended parking lot and that attendants were present when the truck was left and when it was called for, found that there had been no violation of this provision. The Circuit Court of Appeals thought otherwise and said "The obvious purpose of clause nine, * * * was to require that at least one of the two men into whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo, * * *." (Record p. 31.)

ERRORS INTENDED TO BE URGED.

1. The Circuit Court of Appeals erred in construing the language of the policy to require that only agents of the insured could attend the truck,—thereby eliminating attendants in parking lots,—and in placing such a construction on the language "not to be left unattended" as unwarrantedly favored the insurer which had it within its power to define unmistakably the degree of care and kind of attendants required.

2. The Circuit Court of Appeals erred in failing to apply the long-established law of Ohio and in failing to follow its own ruling and those of this Court,—that an insurance policy, containing language susceptible of two or more interpretations, is to be construed strictly against the company which prepared it and favorably to the party which had no voice in its preparation.

ARGUMENT.

I. AN INSURANCE POLICY CONTAINING LANGUAGE SUSCEPTIBLE OF TWO OR MORE CONSTRUCTIONS SHOULD BE CONSTRUED STRICTLY AGAINST THE COMPANY WHICH PREPARED IT AND FAVORABLY TO THE PERSON FOR WHOSE BENEFIT THE POLICY WAS WRITTEN AND WHO HAD NO VOICE IN ITS PREPARATION.

(a) The Tractor and Trailer Combination Was Not Left Unattended while in Transit.

The Circuit Court of Appeals confined its consideration of the case almost wholly to Paragraph 9 of the policy and in particular to the word "unattended" contained therein. Paragraph 9 of the policy is as follows:

> "9. It is warranted by the assured that in no event shall cargo being transported by any truck or trailer combination *be left unattended* while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

As to the facts bearing on this question of attendance, we quote the following from page 14 of the Stipulation attached to and made a part of the deposition of Fred Meewes and others offered in evidence by the Insurance Company (Record p. 12):

> "Said Hanson received a ticket, for which a consideration was paid, from the *attendant* at the aforementioned parking lot, and left the premises * * *. It is further stipulated that when Walter C. Hanson, the driver of the truck in question, returned to the parking lot * * * there were *two attendants* at said place."

Walter C. Hanson, the sole witness, on direct examination testified that when he parked his truck on the evening of May 10th, 1937 there were *two attendants* in charge (Record, page 15) and when he returned to his truck on the morning of May 11th, 1937, there were *two attendants* in charge. (Record, page 16.) His testimony was uncon-

tradicted. Since then, by Stipulation and uncontradicted testimony, *attendants* were at all times present, how, upon any basis of fact could any conclusion be arrived at other than that the tractor and trailer combination was "not left unattended"? The District Court which had before it all the evidence in the case so concluded. "The court, therefore, is of the opinion that the truck and cargo was not left unattended." (Record, page 9.)

(b) The Language of the Insurance Policy Was, Without Any Basis in Fact or in Law, Construed by the Circuit Court of Appeals in Favor of the Insurer.

It will be apparent to what length the Circuit Court of Appeals went in reading into this paragraph 9 a construction favorable to the insurer when the pertinent language from the opinion of the Circuit Court is placed alongside that of paragraph 9 of the policy:

POLICY:

"9. It is warranted by the assured that in no event shall cargo being transported by any truck or trailer combination *be left unattended* while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

OPINION:

"The obvious purpose of clause nine, supplementing the custody provision of the preceding clause eight, was to require that *at least one of the two men into whose custody* the combination outfit hauling the cargo was placed *should remain during its transit with the cargo,* * * *." (Record, page 31.)

(The "preceding clause eight" has reference to "when cargo is in transportation between points of shipment and destination,"—obviously inapplicable here since that "transportation" had not yet begun, as the District Court decided and the Circuit Court of Appeals did not dispute.) (Record, page 8.)

Following the foregoing quotation from its opinion the Circuit Court of Appeals refers to the case of *Ries & Sons, Inc. vs. Automobile Insurance Company,* 121 N. J. L.,

493, 3 Atl. 2d, 610, which curiously enough names the same insurance company as defendant. But how different from the language of the Ries policy is the language of the policy here involved! The Ries policy provides:

> "* * * shall at all times be in charge of two men, at least one of whom should be in attendance and guarding the truck at all times."

The insurance company which used such unmistakable language in the Ries policy here issued a policy which merely provided that the truck should "not be left unattended." Is it not to be wondered at how the Court of Appeals could arrive at a conclusion that the language of the policy was unambiguous. (Record, page 31.)

(c) The Insurer, Which Wrote the Policy, Chose the Language and Should Have Made it Unmistakable.

Returning to Paragraph 9, the language,—"In no event shall * * * be left unattended" clearly indicated that the Insurance Company neglected, or chose not, to define the degree of attendance or the number or kind of attendants required. It did not specify, as the Court of Appeals goes out of its way to do, that attendants must be agents of the assured. (Record, page 31.) The Insurance Company did not even disqualify as attendants persons such as the Court of Appeals implied to be unsuited,—designating them as "Tom, Dick or Harry," or "a colored fellow." (Record, page 31.)

It should be unnecessary for the court to be forced to imply, or the insured to speculate, as to the meaning of such vital language. Clarity can be so easily achieved. Indeed it was achieved by this very insurance company in the Ries policy.

The responsibility of the insurer has been aptly defined by this Court in *Aschenbrenner vs. U. S. Fidelity & Guaranty Company,* 292 U. S., 80, 54 Supreme Court 590:

> "The phraseology of a contract of insurance is that chosen by the insurer and the contract, in fixed form, is tendered to the prospective policyholder, who is often without technical training and who rarely accepts it with a lawyer at his elbow."

How much more applicable is this to a shipper, who is not even tendered the policy, but who entrusts his cargo to the carrier on representations that the cargo is fully insured?

II. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE LONG ESTABLISHED LAW OF OHIO, ITS OWN RULINGS AND THOSE OF THIS COURT.

The decision of the Circuit Court of Appeals is patently in conflict with the rule laid down in *Erie Railroad Company vs. Tompkins,* 304 U. S., 64, and *Ruhlin vs. New York Life Insurance Company,* 304 U. S., 202, 58 Supreme Court, 860.

In Ohio it has been for a long time the accepted rule that a contract is construed strictly against the person who prepared it and favorably to the person who had no voice in its preparation. The early case of *State of Ohio vs. Executors of Thomas Worthington,* 7 Ohio, Part 1, page 171, has been uniformly followed,—

> "In the interpretation of a contract the document is construed strictly against the person who prepared it and favorably to the person who had no voice in the selection of the language. It is presumed that one using words uses those most favorable to his interest and therefore all doubtful and ambiguous words are to be construed against him. He who speaks should speak plainly, or the other party may explain to his own advantage."

It is an accepted rule of law that insurance policies are no exception to the rules governing the construction and interpretation of contracts,—that an ambiguous contract pre-

pared by one party alone will be construed most strongly against the party preparing it. In *Williston on Contracts* under Section 621, entitled "Scope and Meaning of Contracts," at page 1788, we find the following expression of law, well fortified with citation of authority:

> "Since one who speaks or writes, can by exactness of expression more easily prevent mistakes in meaning than one with whom he is dealing, doubts arising from ambiguity of language are resolved in favor of the latter; and as he will ordinarily be the promisee of the promise in question, it is sometimes stated that the contract, if ambiguous, will be interpreted in favor of the promisee. This rule finds frequent application to policies of insurance which are ordinarily prepared solely by the insurance company and the words, therefore, are construed most strongly against it."

Of the numerous authorities cited the case of *National Surety Company vs. Mutual Veneer Company,* 66 Federal (2d) 88, is typical. This is a Circuit Court of Appeals, Sixth Circuit Court, case. At page 91 of the opinion the Court says:

> "If we conceived that we were dealing with a doubtful question * * * in the coverage of the policy, we would still be constrained to interpret it in favor of the Appellee (Mutual Veneer Co.) upon the principle that insurance policies, if ambiguous in their language, are to be construed strictly against the insurer by whom they were framed."

This same Circuit Court of Appeals for the Sixth Circuit very recently and forcefully reiterated the rule in *Fidelity & Deposit Company of Maryland vs. Friedlander,* 101 Fed. (2d), 106:

> "Where in an insurance policy a term is open to two or more constructions we are required to adopt that one more favorable to the insured * * *. This is a just rule, because insurance policies are written by the insurers."

In this same opinion the Court cited with approval *Aschenbrenner vs. U. S. Fidelity & Guaranty Co.*, 292 U. S. 80, 54 Supreme Court, 590:

> "The phraseology of a contract of insurance is that chosen by the insurer and the contract, in fixed form, is tendered to the prospective policyholder, who is often without technical training and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions that more favorable to the assured will be adopted."

CONCLUSION.

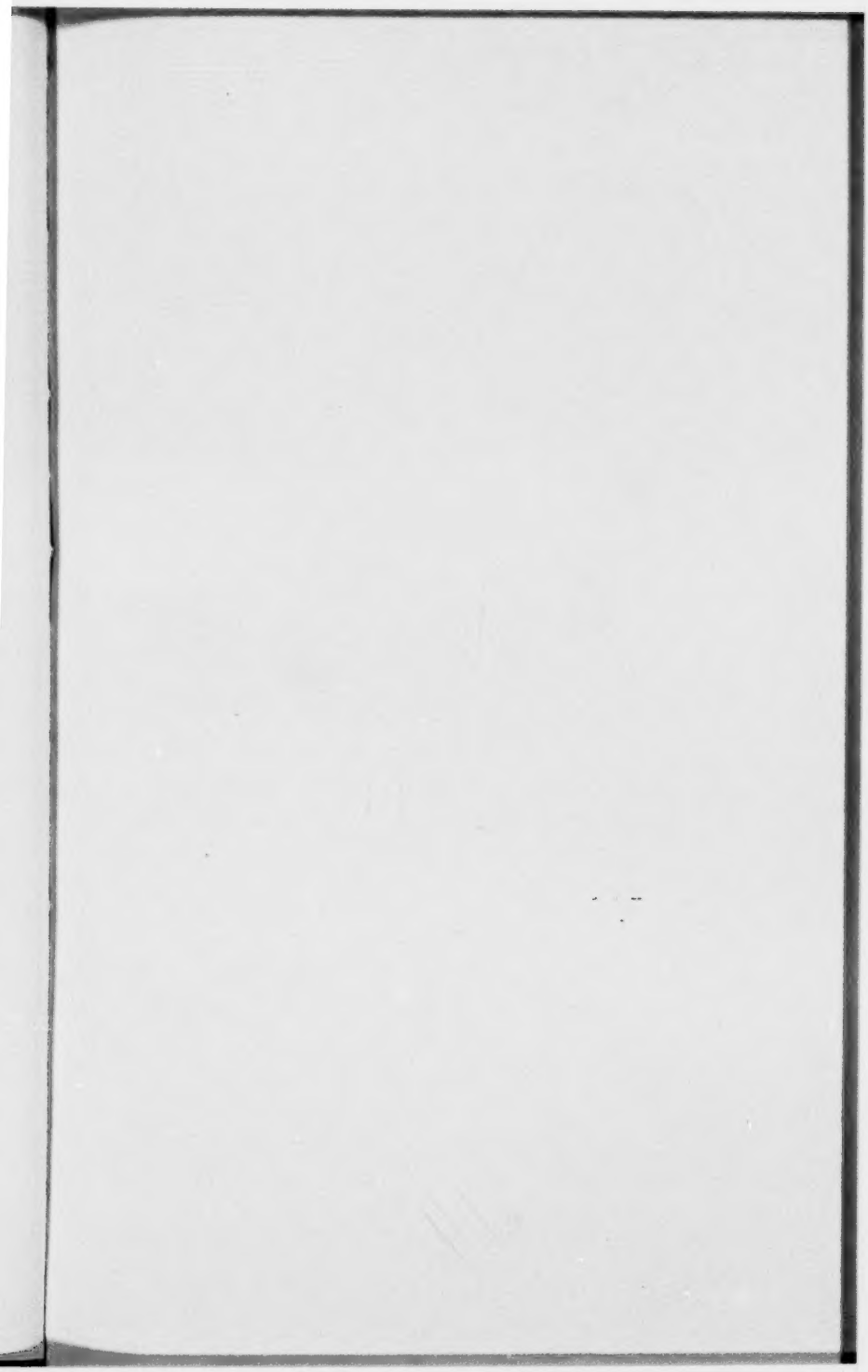
The Circuit Court of Appeals departed from the established law of Ohio and its own decisions, and, without any basis in fact, construed language of an insurance policy in favor of an insurer instead of the party for whose benefit it was written,—in effect writing into the policy provisions that even the insurance company had omitted.

By far the more serious phase of the decision is that if it be allowed to stand it will lead to confusion in the law applicable to trucking companies and the uncertain protection afforded by their insurers. This will have a severely deterrent effect upon both trucking companies and shippers. This method of transportation, only comparatively recently taken under the supervision of the Interstate Commerce Commission, is presumably to be developed and encouraged, especially in these critical times, rather than stifled and discouraged by such adverse decisions.

We submit that the writ of certiorari ought to be granted and the record of the Sixth Circuit restored to conformity.

Respectfully submitted,

JOSEPH MCCORMACK,
GEORGE B. FOLK,
Counsel for Petitioner.



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In the Supreme Court of the United States

OCTOBER TERM 1941.

No. 126.

FIXLER BROS., INC.,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
Respondent.

RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

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RESPONDENT'S BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI.

THE CASE.

Petitioner recovered a default judgment against Gregg Carloading and Distributing Company and brought this suit upon a policy of motor truck merchandise insurance issued to Gregg Carloading and Distributing Company by the respondent. The policy of insurance (R. 5, 6) provided:

> "8. It is warranted by the assured that each tractor and trailer combination outfit operated in the assured's business and covered under this policy shall at all times be in the custody of two men when cargo is in transportation between points of shipment and destination except upon the following runs: (None of which are involved here.)
>
> "9. It is warranted by the assured that in no event shall cargo being transported by any truck or tractor and trailer combination be left unattended while in transit except when garaged in a substantial building, such building to be properly attended in a manner which would reasonably safeguard such cargo against the risk of theft."

The tractor and trailer combination in the sole custody of the operator was taken from the dock of Gregg Carloading and Distributing Company, a common carrier, in New York City, while loaded with merchandise consigned to the petitioner in Chicago, Illinois, to a parking lot in the city of New York. There was no one on the truck after the driver left it in the open parking lot where it remained during the night. There was one attendant in the parking lot during this period when it was stolen.

Petitioner in the trial court recovered judgment for the amount of the default judgment obtained against the carrier. The reviewing court (117 F. (2d) 979) reversed because (R. p. 31):

> "The obvious purpose of Clause Nine, supplementing the custody provision of the preceding Clause Eight, was to require that at least one of the two men into whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo, unless 'garaged' or placed in a substantial building safeguarded in a reasonably prudent manner against the risk of theft. * * *
>
> "This breach by the assured company of the warranty contained in Clause 9 of the policy bars recovery by appellee against the appellant insurer of the amount of the judgment obtained by appellee against the Gregg Carloading and Distributing Company in the state court."

No application for rehearing was made in the Circuit Court of Appeals. Petitioner presents here his petition for certiorari.

It should be denied.

ARGUMENT.

I.

THE LANGUAGE OF THE INSURANCE POLICY IS SUSCEPTIBLE OF BUT ONE MEANING.

1. The tractor and trailer combination was left unattended while in transit.

Paragraph 9 of the policy of insurance provides that cargo shall not be left unattended while in transit. The driver of the truck was the only witness in this case. Counsel for petitioner erroneously state that the uncontradicted testimony is that attendants were at all times present while the tractor and trailer was in the parking lot during the night in question. We quote from the opinion of the Circuit Court of Appeals (R. p. 31):

> "The witness admitted that he was alone when he parked the truck around six-thirty in the evening; that when he got off, there was no one 'at all' on the truck; and that there was only one attendant, 'a colored fellow,' on the parking lot during the night to look after some twenty trucks and several passenger automobiles."

2. The language of the insurance policy was found to be plain and unambiguous.

The reasoning of the Circuit Court of Appeals concerning the plain meaning of Paragraphs 8 and 9 of the insurance policy is found in the opinion of that Court (R. p. 31):

> "Read together, the careful language of the two clauses, eight and nine, points unambiguously to this conclusion, rather than to an assumption that the insurer intended to permit both custodians of the cargo to divest themselves of responsibility for its care by delegating their delegated duty to Tom, Dick, or Harry."

3. The rights of the petitioner are no greater than the rights of the assured.

The petitioner argues that the principles of construction of an insurance contract are much more applicable to a shipper of cargo on a motor truck than they would be to the carrier to whom the policy of insurance was issued. If the terms of an insurance policy be breached by the assured, the rights of a judgment creditor claiming through the assured are no better than the rights of the assured. *Conold v. Stern,* 138 O. S. 352 (1941). This doctrine was enunciated by the Circuit Court of Appeals (R. p. 32) wherein it referred to a previous decision by it,—*Storer vs. Ocean Accident & Guarantee Corp.,* 80 F. (2d) 470 (1935), the pertinent language of which reads as follows:

> "Injured party suing automobile liability insurer after recovering judgment against insured and failing to have it satisfied, had no higher right to enforce policy after insured's breach of condition of cooperation than insured if he were seeking indemnity."

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT IN CONFLICT WITH THE LAW OF OHIO.

Petitioner seeks the writ on the ground that the decision is in conflict with the law of the State of Ohio. The decision is in fact in exact accord with the law of the State of Ohio. One would suppose that in a state where the law is that "insurance policies, like other written contracts, mean what they say and all they say," for "if such contracts are not to be enforced as written, they might as well not be written at all," *National Life & Accident Insurance Co. vs. Ray,* 117 O. S. 13, 22 (1927); 158 N. E. 179, the petitioner would not argue that the opinion of the Circuit Court of Appeals is in conflict with the law of the state. We again quote from the opinion of the Circuit Court of Appeals (R. p. 31):

"Read together, the careful language of the two clauses, eight and nine, points unambiguously to this conclusion, rather than to an assumption that the insurer intended to permit both custodians of the cargo to divest themselves of responsibility for its care by delegating their delegated duty to Tom, Dick, or Harry."

Other cases announcing the law of Ohio are *Rose vs. New York Life Insurance Co.*, 127 O. S. 265 (1933), wherein it is said (pp. 272-3):

"But we may not read a meaning into the clear language of the contract and then find ambiguity in the words which deny that meaning. * * * When the meaning of a contract can be fully and clearly ascertained from its own words, we are at liberty to go no further in search of aid in its interpretation."

And the case of *Burns vs. Employers' Liability Assurance Corp.*, 134 O. S. 222 (1938):

"However, if there is no ambiguity in the policy, there is no occasion to resort to the rule. Undoubtedly the insured is entitled to a liberal construction, but not to such a construction as would include matters which were never conceivably intended to be covered by the parties.

"We feel that the true rule of construction was set forth in *New Amsterdam Casualty Co. v. Johnson, Admx.*, 91 Ohio St., 155, 157, 110 N. E., 475, L. R. A. 1916B, 1018:

" 'In construing the language of an insurance policy it has been universally and properly held that the words of limitation should be most favorably construed in behalf of the insured and against the company.

" 'This does not mean, however, that a strained, unnatural and forced meaning should be given words or phrases, but rather the everyday meaning which must have been plainly in the minds of the contracting parties.' "

The authorities relied on by the petitioner are not controlling in view of the foregoing.

Clearly, therefore, the local rule is exactly that which the Circuit Court of Appeals here applied.

CONCLUSION.

It follows, therefore, that the petition for certiorari should be denied because the conclusion reached by the court below is not only right, but in exact accord with the law of the state.

Respectfully submitted,

McKeehan, Merrick, Arter & Stewart,
Sheldon S. Reynolds,
Thomas V. Koykka,
Counsel for Respondent.

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a Corporation,
Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF.

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THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO

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In the Supreme Court of the United States

OCTOBER TERM 1941.

No. 126.

FIXLER BROS., INC.,
a Corporation,
Petitioner,

vs.

THE AUTOMOBILE INSURANCE COMPANY
OF HARTFORD, CONNECTICUT,
a Corporation,
Respondent.

BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF.

In this reply brief the outline of Respondent's brief will be followed and the questions discussed in that order.

THE CASE.

Two misstatements of facts contained in Respondent's brief under this subject require correction.

The judgment in the Chicago Court was not a default judgment. Counsel for the Gregg Carloading & Distributing Company entered appearance in the pending lawsuit and was present in court when judgment was entered in favor of the petitioner. Respondent had notice of the claim and the pending lawsuit, but elected, as it had the right to do, not to defend its insured. (R. p. 3.)

The parking lot was open only in the respect that it was not under cover, it being surrounded by high buildings and fences with two gates. (R. p. 15.)

ARGUMENT.

I.

THE LANGUAGE OF THE INSURANCE POLICY IS SUSCEPTIBLE OF MORE THAN ONE INTERPRETATION.

In reply to Respondent's contention on pages 3 and 4 of its brief, that the language of the insurance policy is susceptible of but one meaning, the attention of the Court is called to the fact that the language "be left unattended" contained in Paragraph 9 of the insurance policy is the language in question,—more specifically the word "unattended." The degree or nature of attendance was not defined by the Respondent insurance company. It did not specify, as it did in *Ries & Sons, Inc., v. Automobile Insurance Company,* 121 N. J. L., 493, 3 Atl. 2d, 610, that attendants must be agents of the insured. It did not eliminate other attendants such as attendants at parking lots who certainly attend vehicles left in their custody. It merely stated that the tractor and trailer combination should not "be left unattended." Could it be said then that if attendants at a fenced-in parking lot were at all times present, as was admitted, this would not be a sufficient compliance with the requirements of the policy,—that the tractor and trailer combination should not be left unattended? The District Court which had before it all of the evidence and heard the testimony of the only witness found that the tractor and trailer combination was not left unattended. In view of these admitted facts and in view of the District Court's findings, it is readily apparent how far the Circuit Court of Appeals went afield in construing the language of the contract when it found that,—"at least one of the two men in whose custody the combination outfit hauling the cargo was placed should remain during its transit with the cargo." No such language was in this contract. The Circuit Court of Appeals in effect wrote into the insurance policy provisions favoring the insurance company even beyond the claims of Respondent.

II.

THE DECISION OF THE CIRCUIT COURT OF APPEALS IS IN CONFLICT WITH THE LAW OF OHIO.

With respect to the argument of Respondent that the decision of the Circuit Court of Appeals is not in conflict with the law of Ohio, an examination of the cases cited by Respondent indicate no variance from the established Ohio rule, that insurance contracts are no exception to the rules governing the construction and interpretation of other contracts, namely, that an ambiguous contract prepared by one party alone will be construed most strongly against the party preparing it. To quote again from *Fidelity & Deposit Company of Maryland v. Friedlander,* 101 Federal 2d, 106:

> "Where in an insurance policy a term is open to two or more constructions we are required to adopt that one most favorable to the insured * * *. This is a just rule, because insurance policies are written by the insurers."

CONCLUSION.

We submit, therefore, that the writ of certiorari ought to be granted, because the Circuit Court of Appeals departed from the established law of Ohio and its own decisions and, without any basis in fact, construed language of an insurance policy in favor of the insurer instead of the party for whose benefit it was written.

Respectfully submitted,

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SUPPLEMENT TO BRIEF OF PETITIONER IN REPLY TO RESPONDENT'S BRIEF.

1. RESPECTING—(a) "THE TRACTOR AND TRAILER COMBINATION WAS LEFT UNATTENDED."

Respondent, on page 3 of its Brief, contends that our statement that the uncontradicted testimony was that attendants were at all times present while the tractor and trailer were in the parking lot was erroneous. The excerpt from the opinion of the Circuit Court of Appeals quoted by respondent as support for its contention possibly gives, at first sight, a slightly contrary impression, but insofar as it does, it is what is erroneous, not our statement,—which merely paraphrases the following finding of fact by the trial court, based upon a stipulation of counsel on this point, as well as upon the uncontradicted evidence:

> "With respect to the second issue of fact, stipulations of counsel and the uncontradicted testimony of witness Hanson indicate that when assured's agent drove the truck and cargo into the parking lot and ceased to attend it, he left it in charge of the day and

night attendants at the parking lot * * *. The Court, therefore, is of the opinion that the truck and cargo was not left unattended." (R. p. 8.)

There were two attendants there when the driver arrived in the evening, and there were two attendants there when he returned the next morning. (R. p. 16.)

The Circuit Court of Appeals apparently preferred to rely upon a haphazard answer of the witness at the end of the cross examination, when counsel interjected into the case for the first time the color of a night attendant:

"Q. And this night attendant that you told us about was a colored lad?

A. A colored fellow." (R. p. 18.)

The witness was not talking about the night of the theft at all, but rather about some other night when he had arrived later and had then seen a colored man.

(b) "WHILE IN TRANSIT."

It should not be overlooked that the tractor and trailer combination was to return to the loading dock of the carrier the next morning for the completion of loading, before beginning its journey to Cleveland and Chicago. It was not, therefore, "in transportation between points of shipment and destination," and the requirement of clause eight of the policy that it be in the custody of two men was not applicable,—as specifically found by the District Court. (R. p. 8.)

Since the two-man requirement had not yet become applicable, the reasoning of the Court of Appeals that the obvious purpose of clause nine was to require that at least one of the same two men should *remain* during transit is hardly logical. When paragraph eight falls because inapplicable, any dependence of paragraph nine upon it likewise falls, unless specifically excepted.

2. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS NOT ONLY IN CONFLICT WITH THE LAW OF OHIO, BUT ALSO WITH THE DECISIONS OF THE SUPREME COURT AND OF THE SIXTH CIRCUIT COURT OF APPEALS ITSELF.

Ohio cases cited in Respondent's Brief rather tend to confirm and strengthen our position. *National Life & Accident Insurance Company v. Ray,* 117 O. S. 13, 158 N. E. 179, is cited to the point that insurance contracts are to be enforced as written. We have asked nothing more; we are protesting that the Circuit Court of Appeals did not do that, but instead wrote into clause nine of the policy an additional requirement.

Another of Respondent's cases (*Burns v. Employers' Liability Assurance Corp.,* 134 O. S. 222) goes even further than our own citations, when it says: "Undoubtedly the assured is entitled to a liberal construction," which we have not requested here.

Respondent makes no comment on the governing decisions of the Sixth Circuit Court of Appeals itself, referred to on page 13 of our Brief. It would not be a simple matter to argue away their force and authority. For that court, in *Fidelity and Deposit Company of Maryland v. Friedlander,* 101 F. (2d) 106, went so far as to hold that an employee of an independent contractor, Ed Foley, was an employee of the Assured, Friedlander, within the meaning of a paragraph in a robbery insurance policy requiring the presence in the jewelry store of a custodian and "one other employee of the Assured."

In this case, the importance of which in establishing a conflict it would be difficult to overestimate, the insurance policies provided coverage as follows:

> "Section (f). On property specified in Item 8, from within the premises, while a custodian and at least *one other employee of the Assured are on duty therein.*"
>
> "There will be *one or more employees* (state number) or members or officers of the firm *on duty inside*

the premises in addition to the custodian at all times this policy is in force."

Friedlander, the Assured, operated a small jewelry store where a robbery occurred early in the morning of October 5, 1935. Only the manager of the store was on the premises, being engaged in putting diamonds in the show window when there arrived a man named Peterson, employed by Foley, operator of a window cleaning company. The manager reached over and unlocked the door to permit Peterson to enter. While Peterson was in the act of closing the door, the robbers entered.

The only question to be decided was, was Peterson an employee of Friedlander within the meaning of the quoted policy provisions? Friedlander had, a few months previously, entered into a contract with Foley by which the latter agreed for a compensation of $7 per month to supply the jewelry store with window cleaning and certain other janitor service, which was performed each morning prior to the opening of the store for business. Friedlander had nothing to do with the selection of the employee of Foley who was to do the work, and had no right of direction or control in the manner, means or details of how the work was to be done. Foley paid Peterson's salary and he alone had the right to discharge him. Neither Foley nor Peterson had a key to the store. By all ordinary tests, Peterson was of course not an employee of Friedlander, the Assured.

Yet the Sixth Circuit Court of Appeals held that in the sense of the quoted provisions of the policies Peterson was an employee of Friedlander. To imagine a greater and more direct conflict between this decision and the one in the case at bar would be impossible.

For in the *Friedlander* case, the Court holds that an undoubted employee of another may be considered an "employee of the Assured," while in our case it holds that "attended," without further definition, or requirement, can only be satisfied or complied with by *an employee of the*

carrier,—or, more specifically, by one of the two men provided for in another paragraph to have custody of the tractor and trailer combination *when cargo is in transportation* between points of shipment and destination,—"rolling along the road" as the District Judge characterized it,—a paragraph and provision obviously inapplicable here since the transportation had not yet begun, as the District Court found.

Respectfully submitted,

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